



**PUBLIC HEARING
BEFORE THE GALLATIN COUNTY / BOZEMAN AREA
BOARD OF ADJUSTMENT**

**THE HANGER LLC &
FILMLITES MONTANA LLC;
APPELLANTS**

**FINDINGS, CONCLUSIONS AND
ORDER**

SUMMARY OF PROCEEDINGS

This matter comes before the Gallatin County / Bozeman Area Board of Adjustment (BOA) on January 15, 2008 as an appeal from the May 17, 2007 decision of the Gallatin County Code Compliance Specialist (CCS) that the appellant's are operating a commercial use from the 620 Canary Lane, Bozeman, MT in violation of Gallatin County / Bozeman Area (GC/BA) Zoning Regulations (Regulation). Pursuant to MCA Section 76-2-223(a) and Section 56.030(A)(1) of the Regulation, the purpose of this appeal hearing was to determine if the May 17, 2007 decision by the Gallatin County Code Compliance Specialist were made in error. In this matter, the Code Compliance Specialist determined that The Hanger LLC and Filmlites Montana LLC are operating a commercial use from 620 Canary Lane, Bozeman, MT in violation of Sections 12.020(B) and 54.050(D)(4) of the GC/BA Zoning Regulation, because the CUP (Conditional Use Permit) and PUD (Planned Unit Development) were not amended to change the use from a "Recreation Area" to a commercial use.

Pursuant to the GC/BA Zoning Regulation, which was adopted on July 27, 1999 and amended thereafter, and after legal notice, a public hearing was held before the BOA in Bozeman, MT on January 15, 2008. Notice of the public hearing was published in the Bozeman Daily Chronicle on December 23, 2007 and December 30, 2007, and sent to adjacent property owners via certified mail.

APPLICABLE REGULATIONS

1. The Gallatin County / Bozeman Area (GC/BA) Zoning Regulation was adopted by the Gallatin County Commission on July 27, 1999, and amended thereafter.
2. Section 12 of the Regulation regulates permitted and conditional uses in a R-S Residential Suburban District. The intent of this district is to allow Planed Unit Developments (PUD's) and single-household developments on lots of one acre.

3. Pursuant to Section 12.020B of the GC/BA Zoning Regulation, any use approved as part of a PUD is a *Conditional Use* in the R-S District, subject to the provisions of Section 54 (PUD Procedures).
4. Pursuant to Section 53.030(B) of the Regulation (CUP Procedures), a Conditional Use Permit (CUP) is binding upon the owner of the land, his successors or assigns.
5. Pursuant to Section 54.050(D)(4) (PUD Procedures), a major change to a Planned Unit Development shall be approved only by the County Commission, and must follow the same planned unit development review and public hearing process required for approval of preliminary plans.

TESTIMONY

6. Holly March, on behalf of Lands of the Hanger LLC/David Richards testified:
 - A. About the nature of commercial activity occurring in the building since at least 1993 in support of a claim for a valid nonconforming use.
 - B. That the determination of the Code Compliance Specialist should be reversed because there has been an unexplained delay of such duration as to render the enforcement of the CUP/PUD inequitable (Laches).
 - C. That the determination of the Code Compliance Specialist should be reversed because Mr. Richards relied on the vote from the homeowners association that they did not want the recreation area, and the determination from the County Attorney's Office that all necessary steps were taken to change the covenants and remove the recreation area from open space. Mr. Richards believed all necessary steps were taken and sufficient, and now Gallatin County and the homeowners association have changed their position (Equitable Estoppel).
 - D. That the determination of the Code Compliance Specialist should be reversed because Gallatin County had the opportunity to enforce the improvements agreement and failed to act.
7. Ryan Jackson, on behalf of Filmlites Montana LLC, testified:
 - A. That the approval of the revised covenants by the County Attorney carried more weight than the letter from Ms. Arkell (Bozeman City Planning) informing Mr. Richards that a hearing process must be followed to change the recreation area. Mr. Jackson argued that

since the county attorney's office approved the covenants, then there is cause for reverting back to a nonconforming use determination.

B. That commercial dry storage is a valid nonconforming use that has occurred on the property since at least 1993. He reviewed the nonconforming use criteria specified in Section 50.160 of the Zoning Regulation. Mr. Jackson stated that at no time, since Mr. Richards has owned the property, has anyone alleged their health, safety, or welfare was at risk.

8. Residents of the Fort Ellis Leisure Community subdivision, including Doug East (7:02 pm - 7:40 pm), Karl Seel (7:40 pm - 7:53 pm), Richard Damon (7:53 pm - 7:56 pm), Glen Nygren (7:56 pm - 8:00 pm), Rich Kelly (8:00 pm - 8:02 pm), Brad Moholt (8:02 pm - 8:06 pm), Kathleen Williams (8:06 pm - 8:08 pm), and Jaclyn Katz (8:25 pm - 8:33 pm) testified in opposition to continued commercial use of 620 Canary Lane in violation of the GC/BA Zoning Regulation.
9. Doug East testified that the developers (David Richards and Nadia Beiser) controlled the Home Owners Association until October 2002, and that homeowners were not presented with other less costly recreational options in 1999. He stated that homeowners want the opportunity to make choices on how the property is used.
10. Karl Seel testified that he was present for the ballot vote in 1999, and that there was no discussion of changing the zoning, or of changing ownership to Mr. Richards various corporations, or that future uses would be commercial in nature. He did not believe they were giving up interest in the land, and that they are not in a position to contract away zoning or ownership interest. He stated that proper procedures should be followed to change the CUP/PUD with Gallatin County to ensure any use is approved with public involvement.
11. JP Gabriel, owner of Filmlites Montana LLC, testified that he has leased the site from David Richards for approximately six years. Mr. Gabriel said he understood the building belonged to Mr. Richards, and he never realized there was a problem with the zoning.
12. Holly March, representing The Hanger LLC/David Richards, further testified that the Fort Ellis Leisure Community homeowners association never owned the property. The \$1300 estimate given to homeowners was cost was the cost of maintaining the building, not to build amenities.
13. David Richards stated that there was nothing in the homeowner's titles stating that they owned part of the 3.27-acre lot. The concept of owning the recreation area was only a concept that did not work. Future uses were never discussed and the issue never came up. Mr. Richards

believed that the homeowner's vote meant he could do whatever he wanted with the building. Mr. Richards also stated he never sold the property to Filmlites because their attorney saw a zoning nonconforming use problem when it was time to draw up the contract.

14. Ryan Jackson, representing Filmlites, further stated that the issue of what happened between the developer and homeowners is irrelevant; what is relevant are the arguments put before Board, and the facts between the developers and Gallatin County. The County Attorney's office reviewed the revised covenants, and they were filed at the Clerk and Recorder's Office. The homeowners association never had any ownership interest in this property. The issue before the Board is justice and equity, and about a government agency enforcing a zoning provision long after they are allowed to do so.
15. Amy Waring, Code Compliance Specialist, stated the Board must determine if her February 22, 2007 and May 17, 2007 decisions were in error pursuant to MCA Section 76-2-223(a). Ms. Waring stated that the City of Bozeman administered the GC/BA Zoning Regulation prior to adoption by Gallatin County on July 27, 1999, and that the improvements agreement referenced by the appellant was with the City of Bozeman, prior to Gallatin County's adoption of the Zoning Regulation.

FINDINGS OF FACT

16. The Lands of the Hanger LLC property at 620 Canary Lane (the "property") is located in the R-S Residential Suburban District of the Gallatin County / Bozeman Area (GC/BA) Zoning District, and was designated a "Recreation Area" for the Fort Ellis Leisure Community Planned Unit Development.
17. The Bozeman City Commission implemented the GC/BZ Zoning Regulation prior to Gallatin County's adopted of the Regulation on July 27, 1999, and approved a CUP and final site plan for the Fort Ellis Subdivision Planned Unit Development (PUD) on July 25, 1994 and December 15, 1995 respectively. As part of that approval, the property described as 620 Canary Lane was designated a "Recreation Area" for residents of the Fort Ellis Subdivision.
18. The Gallatin County Commission approved the Preliminary Plat and Final Plat for the Fort Ellis Leisure Community Phase 1-A Planned Unit Development on July/August 26, 1994 and January 2, 1996, respectively (as the governing body that reviews subdivisions). As part of that approval, the property described as 620 Canary Lane was designated a "Recreation Area" for residents of the Fort Ellis Subdivision.

19. Filmlites Montana LLC operates from 620 Canary Lane, Bozeman, MT (designated as the “Recreation Area” on the final plat for the Fort Ellis Leisure Community Phase 1-A Subdivision in the SE ¼ of 16, T 2 S, R 6 E, P.M.M., Gallatin County). The property is owned by Lands of the Hanger LLC (David Richards).
20. On March 31, 2006, the Code Compliance Specialist received a complaint from the Fort Ellis Leisure Community Home Owners Association that the Hanger LLC is leasing the property at 620 Canary Lane, Bozeman, MT to Filmlites Montana LLC for an illegal commercial use. Both the Conditional Use Permit (CUP) and Planned Unit Development (PUD) for the Fort Ellis Community subdivision designate this property and associated building for recreational use. The property is not zoned for commercial use.
21. On January 10, 1999 the Fort Ellis homeowners met with the developer at a homeowners association meeting. Those present discussed the future of the recreational building, and decided to send out a ballot for a vote on whether the association should own, maintain or use the recreational area. The result was that 27 of 28 lot owners approved an amendment to the subdivision’s covenants and abandon the original concept of the Homeowner’s Association using, owning, or controlling and maintaining a recreational building and associated recreated recreational uses at a cost of \$1300 per lot per year.
22. On June 21, 1999, Debbie Arkell (City of Bozeman) sent a memorandum to Nadia Beiser (representing Planned Development Inc.) advising her that changes to the recreational lot are a major modification to the PUD, require full review and public hearings, and an amendment to the subdivision is likely.
23. On October 26, 1999, Planned Development Inc. filed revised covenants for Fort Ellis Leisure Community Phase 1-A (Document No. 200178). The revised covenants are dated June 1999, and remove the recreational area from the definition of common area.
24. On November 22, 2004 Mr. Richards filed COS No. J-221-B, which is a Retracement Survey. The survey replaced the words “Recreation Area” with “Lands of the Hanger” on the 3.72-acre parcel.
25. On February 22, 2007 and May 17, 2007, the Code Compliance Specialist determined that the Hanger LLC and Filmlites Montana LLC are operating a commercial use from 620 Canary Lane in violation of Sections 12.020(B) and 54.050(D)(4) of the GC/BA Zoning Regulation because the PUD and CUP were not amended to change the use from a “Recreation Area” to a commercial use.

26. On July 2, 2007, the Hanger LLC and Filmlites Montana LLC filed an appeal of the Code Compliance Specialist's May 17, 2007 decision and cease and desist order. The appeal was timely.
27. The Code Compliance Specialist placed the appeal on hold between July 2, 2007 and October 30, 2007 while the appellants and the homeowners association attempted to work out an agreement. No agreement was reached.
28. On October 30, 2007, the Hanger LLC and Filmlites Montana LLC supplemented their July 2, 2007 appeal.

CONCLUSIONS

29. After considering public testimony and in board discussion, the GC/BA Board of Adjustment concludes:
 - A. To adopt and incorporate the findings contained in the Code Compliance Specialist's staff report.
 - B. That a CUP and PUD are binding upon the owner of the land, his successors or assigns; therefore a nonconforming use determination does not apply and is not appropriate.
 - C. That it is the duty of the developer to act in good faith to meet the conditions of a PUD, which they have not done. Citizens serve as watchdogs for the community; complaints may be filed at any time. The defenses of equitable estoppel, laches and statute of limitations do not apply to the Fort Ellis Homeowners Association informing Gallatin County that there was an illegal use occurring in a R-S zone.
 - D. That people cannot privately contract away zoning provisions put in place by Gallatin County. The homeowner's vote to change the subdivision covenants does not negate the fact that the area was designated a "recreation area" on the Fort Ellis PUD and CUP, and that the County Commission must approve any changes to a use that was approved through zoning.
 - E. That the appellant has not met its burden pursuant to Section 50.160 in terms of abandonment, changes of nonconforming uses, and other applications/subsections of Section 50.160 regarding a nonconforming use determination.
 - F. That the Hanger LLC / Filmlites Montana LLC are operating a commercial business from 620 Canary Lane in violation of the Sections 12.020(B) and 54.050(D)(4) of the

GC/BA Zoning Regulation, because the CUP (Conditional Use Permit) and PUD (Planned Unit Development) were not amended to change the use from a “Recreation Area” to a commercial use.

- G. Upon motion was made by Member Curtis, and seconded by Member Armstrong, and pursuant to MCA Section 76-2-223(a) and Section 56.030(A)(1) of the Regulation, the GC/BA Board of Adjustment unanimously concludes that the Code Compliance Specialist was not in error. The GC/BA Board of Adjustment affirms the May 17, 2007 decision and cease and desist order by the Gallatin County Code Compliance Specialist.

DETERMINATION AND ORDER

The BOA having made and adopted the above findings of fact and conclusions as a part of this determination, and after due deliberation and consideration of all the facts, circumstances, rules, laws and regulations, and after carefully considering the testimony, documents, exhibits, and submissions in this case enters a determination that the Code Compliance Specialist was not in error and the May 17, 2007 decision is hereby AFFIRMED.

Gallatin County / Bozeman Area Board of Adjustment

Jason Armstrong, Chairman

Date